United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-107

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

To be argued by
MARK LEMLE AMSTERDAM

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UNITED STATES OF AMERICA,
Appellee

-v-

JOHN VAN ORSDELL
Defendant-Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

The government's brief correctly states that defendant's single claim on this appeal concerns the sufficiency of the government's disclosure of electronic surveillance and so-called " confidential source". But nothing in the government's brief justifies their cavalier disregard for the rights of the defendant and the integrity of the judicial process. Indeed, the government would have this Court disregard the major advances in the constitutional guarantees of an accused person by acting totally contrary to several significant holdings of the Supreme Court.

A. WIRETAPPING

The defense had made their objections to the FBI

affidavit well known to the trial court. In fact, during the hearing on surveillance, defendant vociferously demanded a full evidentiary hearing on the issue of surveillance because he was convinced such surveillance existed and the FBI affidavit was insufficient to deny it. The second FBI affidavit in again failing to either affirm or deny the existence of overhearings, ie., indirect surveillance, was totally meaningless.*

While the government now seems to oppose the requirement that overhearings be disclosed, that requirement has been enunciated by the Supreme Court in Alderman v United States, 394 U.S. 165 (1969), and is clearly the law of the land.

Not only did the FBI not deny the existence of overhearings of defendant, but the Bureau is almost incapable of making such denial in affidavit form. For the reasons already outlined in defendant's main brief on appeal, the record-keeping procedures of the FBI do not lend themselves to full and forthright disclosure. Only the agent(s) who actually overheard the defendant know for certain of the existence of the overhearing, and if they fail (for obvious

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* The footnote on page 10 of the government's brief is inaccurate in stating that the issue of overhearings did not arise below. As the government themselves recognize, the defense objected to the absence in the FBI affidavit of any mention of " indirect surveillance". Indirect surveillance is nothing more than overhearings; it is merely the technical jargon. To correct the obvious deficiency in the FBI affidavit, the trial judge ordered the FBI to respond as to indirect surveillance. The Bureau failed to do so.

reasons) to pass on the source of their information, the record of surveillance would not appear in the FBI files. Thus, it is extremely important to pin down the affiant to precise language, otherwise:

> (i)f any of the conclusions in the affidavit were later proved wrong, it would be impossible to establish that the affidavit was perjured. *
>
> United States v Alter, 482 F.2d 1016, 1027 (9th Cir. 1973)

B. THE SURVEILLANCE HEARING

The trial judge noted that the timing between the defendant's arrest and a phone call he made to Robert Greenman** gave rise to a "presumption" that the two events were connected. (Tr. 492) The government, apparantly not desirous of recalling that these were the words of the trial judge, attributes them to the defendant calling them the " speculative contention " of appellant. (Government's Brief, page 11) There clearly was such a presumption; it was recognized by the trial judge; and it was not dispelled by the government.

While the FBI agent stated out of the presence of the jury that the " confidential source " was a human being, under

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* The FBI recently admitted that the failure to include an overhearing in the file under the overheard individual's name is an "error". This gap was the subject of an item in the New York Times, June 6, 1975, p 11, Col.4.

** It is not material to this appeal where these calls were made from. The only relevant question is whether defendant was overheard.

the circumstances of this case, his testimony should be viewed in the most skeptical light. Not only have such statements previously turned out to be false, United States v Coplon, 185 F. 2d 629 (2d Cir. 1950); United States v Banks, 374 F. Supp. 321; 383 F. Supp. 389 (D.S.D. 1974), but the agent himself was testifying incorrectly.* Furthermore, the FBI was a real party in interest to these proceedings due to the bad publicity, pranks, and public exposure caused by the actions of the defendant. As such, Agent Behrend's testimony is extremely suspect.

The facts give rise to a " presumption" as Judge Knapp called it, that Van Orsdell's phone call to Greenman was overheard. The government was obligated to make further disclosure to rebut that inference. Since only a hearing would have revealed the truth as to overhearings (at least under the circumstances of this case), such hearing was required.

C. THE IDENTITY OF THE INFORMANT

The government's cavalier attitude is seen nowhere as clearly as in their outrageous suggestion that the

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* Despite Agent Behrend's attempts to fix the date of the arrival of the confidential source as from August to September (thereby justifying the lateness of the start of bank surveillance), the record is contrary. This misstatement is of the utmost significance to how the government came to arrest defendant.

government need not disclose the identity of an informant who participated in or who witnessed crucial conversations because:"Van Orsdell need only review his own memory to recall whom he spoke with." (Government's Brief, page 15). If the government's view were to prevail, there would be no need for Rule 16(a), F.R.Cr.P, since a defendant could simply remember what statements he made, and to whom he made them. Indeed, there would be no need to charge a defendant with any degree of specificity since, presumably, he knows what he did wrong.

The Supreme Court has stated that a defendant is entitled to know the identity of an informant who is more than a mere tipster. Roviaro v United States, 353 U.S. 53 (1957). The informant herein was obviously more than a mere tipster and was apparantly witness to at least one crucial conversation.

The government makes no effort to justify their invocation of the informer privilege . They make no attempt to balance their end of the scales of justice with an allegation that it was somehow necessary to keep secret the identity of the informant. All that the government has done is make a bare announcement that they are invoking the informer privilege. As the Supreme Court so recently held under a momentous circumstance, the invocation of such privileges cannot be upheld merely because the government so desires.

> When the ground for asserting privilege as to ...materials sought for use in a criminal trial is based only on the generalized interest in

> confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.
>
> United States v Nixon, 94 S. Ct. 3090, 3110 (1974)

In the instant case, the government did not even proffer a generalized interest of confidentiality. All they said was that theyfelt the defendant had no right to it. Thus, there was nothing on the government side in the balancing test.

Finally, it must be remembered that such privileges should not be "expansively construed for they are in derrogation of the truth." United States v Nixon, supra, at 3108.

The non-specific privilege invoked by the government herein must yield to the specific needs of the defendant to prove his innocent intent.*

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* Since Van Orsdell was in essence the only witness on intent, and since the informer apparantly overheard at least one conversation between the defendant and Robert Greenman, the informer may have been able to impeach Greenman's testimony as well as exculpate the defendant. Therefore, the informer's testimony would have been of the utmost importance.

CONCLUSION

FOR THE REASONS OUTLINED AND IN THE INTEREST OF INSURING JUSTICE IN THIS AND OTHER SIMILAR CASES, THE CONVICTION MUST BE REVERSED.

Respectfully submitted,

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Dated: New York, New York
June 6, 1975

CERTIFICATE OF SERVICE

This is to certify that I have sent by personal messenger this day two (2) copies of the Appellant's Reply Brief to Don. D. Buchwald, Assistant U.S. Attorney, United States Courthouse, Foley Square, New York.

MARK LEMLE AMSTERDAM